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No. 07-767

IN THE

Supreme Court of the United States

JAMES D. ALJIAN, KIRK KERKORIAN, AND TRACINDA CORPORATION,

Petitioners,

v.

DONALD JOHNSON, Individually and on Behalf of All Others Similarly Situated,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONERS

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15 U.S.C. § 78j(b) [Section 10(b) of the
Securities Exchange Act of 1934] ..... *passim*

15 U.S.C. § 78t-1 [Section 20A of the
Securities Exchange Act of 1934] ..... *passim*

134 Cong. Rec. H7468 (1988) 9

134 Cong. Rec. H7470 (1988) 9

H.R. Rep. No. 100-910, at 7 (1988) 9

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Respondent does not dispute that: 1) the petition presents a purely legal issue of statutory construction and interpretation; 2) the issue is squarely presented in this case; and 3) this is an important issue for insider trading cases now and in years to come. Instead, respondent attempts to persuade the Court that there is no conflict between the Ninth Circuit decision and the decisions of this Court and other circuit courts, and that the Ninth Circuit's decision is based on "well-established legal standards and plain statutory language." Opp. at 6-7. However, as the petition demonstrates and as detailed herein, neither the Ninth Circuit's decision nor the applicable legal authorities support either of respondent's arguments.

The Court should grant the petition and resolve the conflicts presented by the opinions below, providing the proper and definitive position for those addressing the presently varying interpretations of the interplay between claims of insider trading under Section 20A of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78t-1, and the predicate violations the statute requires.

I. The Ninth Circuit Decision Is in Conflict with Decisions from This Court and Other Circuit Courts.

Respondent contends that the Ninth Circuit correctly applied established law and there is no conflict with decisions of this Court or other appellate

decisions. Respondent reaches this conclusion only by disregarding key decisions identified in the petition or focusing on ancillary issues.

The Ninth Circuit's conclusion that a predicate violation need not be timely asserted to support a derivative claim is in direct contravention of this Court's holdings in *The Harrisburg*, 119 U.S. 199, 214 (1886), *overruled on other grounds by Moragne v. States Marine Lines*, 398 U.S. 375 (1970), and *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991), *superseded in part by statute*, 28 U.S.C. § 1658(b). In *The Harrisburg*, this Court held that the limitations period is a limitation of the liability and right itself, not just the remedy. Pet. at 9-10. In *Lampf*, this Court held that the three-year statute of repose applied therein to claims under Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), is inconsistent with equitable tolling "[b]ecause the purpose of the 3-year limitation is clearly to serve as a cutoff." Pet. at 16-17 (quoting 501 U.S. at 363).

In addition, the Ninth Circuit decision rests on the mistaken notion that a limitations or repose period under the Exchange Act does not equate with an element of the claim. As explained in the petition, this conclusion is irreconcilable with this Court's statements in *Musick, Peeler & Garrett v. Employers Insurance of Wausau*, 508 U.S. 286, 295, 301 (1993), *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 172 (1994), *superseded in part by statute*, 15 U.S.C. § 78t(e), and *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (2005). *Musick* and *Central Bank* strongly support

the proposition that the limitations period is an element of a Section 10(b) claim (Pet. at 13-24), and *Plaut* expressly confirms that a dismissal on limitations grounds is treated the same as "a dismissal for failure to state a claim, for failure to prove substantive liability, or for failure to prosecute: as a judgment on the merits" (Pet. at 20-21 (quoting 514 U.S. at 228)).

Tellingly, respondent does not even mention *The Harrisburg* or *Plaut*, and fails to address this Court's holding in *Lampf* that the three-year repose period for Section 10(b) could not be extended.[1] Rather, respondent cuts with a very thin blade by attempting to distinguish "liability" from "violation," suggesting a determination that a violation occurred does not require a finding of liability. Opp. at 9-10. However, this argument not only runs counter to

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[1] Respondent focuses, instead, on this Court's statement in *Lampf* that "[r]ecognizing the unique difficulties in identifying evidence of [insider trading] activities, the 100th Congress adopted § 20A as one of 'a variety of measures designed to provide greater deterrence, detection and punishment of violations of insider trading.' H. R. Rep. No. 100-910, p. 7 (1988). There is no indication that the drafters of § 20A sought to extend that enhanced protection to other provisions of the 1934 Act. Indeed, the text of § 20A indicates the contrary." Opp. at 12-13 (quoting 501 U.S. at 361). However, as this Court is aware, *Lampf* did not involve consideration or analysis of the predicate violation requirement in Section 20A or the interplay between the limitations and repose periods for such predicate acts and the five-year outside limitation included in Section 20A. The Court was focused solely on what uniform limitations and repose periods to apply to Section 10(b) claims.

Plaut, but also assumes what amounts to a Kantian epistemological analytic truth – that the concept of a violation is known independently, without reference to any experience, such as the determination of liability. Respondent assumes too much, given that the terms "violation" and "liability" are legal concepts that must be applied to facts and are dependent upon the intentions of the lawmakers drafting the statute, the legal landscape at the time and the context from other provisions of the statute. If a violation could be determined independently by what someone "ordinarily understood," as suggested by the Ninth Circuit, there would be no reason for legal proceedings to determine liability, undermining one of the foundational elements of our legal system – innocent until proven guilty.

Likewise, respondent attempts to downplay *Central Bank*. Opp. at 11-12 n.4. However, respondent cannot do so without discounting this Court's carefully chosen language, which characterizes the limitations period under Section 10(b) as one of "the elements of the 10b-5 private liability scheme" that the Court has addressed (Pet. at 13-14; *Central Bank*, 511 U.S. at 172), and deducing what it believes the Court really meant to say. Respondent does not even attempt to address Justice Kennedy's statement for the majority in *Musick*, or Justice Thomas's statement in the dissent, that recognize that the limitations period is part and parcel of a Section 10(b) claim. *See* Pet. at 13.

The petition also describes how these aspects of the Ninth Circuit decision are in conflict with other

appellate rulings, including *Jackson National Life Insurance Co. v. Merrill Lynch & Co.*, 32 F.3d 697, 704 (2d Cir. 1994), *In re Advanta Corp. Securities Litigation*, 180 F.3d 525, 541 (3d Cir. 1999), and *Teachers' Retirement System v. Hunter*, 477 F.3d 162, 169 (4th Cir. 2007).

With regard to *Jackson National*, respondent distorts the import of the Second Circuit's ruling by focusing on the fact that the plaintiff there sought to use a Securities Act claim, rather than an Exchange Act claim, as the predicate violation. Opp. at 14. While this is contrary to Section 2 A's express requirement of an Exchange Act predicate violation, the Second Circuit did not stop there in its analysis and holding. Instead, the Second Circuit expressly held that "[t]he three-year [repose period governing the predicate claim] is an absolute limitation ....[and] *[f]or us to accept Jackson National's argument would put us in conflict with Congress's evident intent not to permit ... liability to extend beyond the three-year horizon.*" *Jackson Nat'l*, 32 F.3d at 704 (emphasis added). Whether the repose period at issue is attached to a Securities Act claim or an Exchange Act claim is irrelevant to the Second Circuit's analysis and the absolute cutoff created by a repose period, which was also recognized by this Court in *Lampf*. Pet. at 12-13, 16-17.

In addition, respondent attempts to distinguish the decision in *Advanta* by arguing that the case involved a missing essential element of the Section 10(b) predicate claim – scienter. Opp. at 14-15. However, respondent's argument does not

eliminate the conflict. First, this Court has recognized the integral nature of the limitations and repose periods of Section 10(b), equating them with the elements of a claim under that statute. Pet. at 13-14. Second, *Advanta* supports the proposition that the derivative claim must create a basis for liability (that is, be "actionable"). Pet. at 18-19. Regardless of whether scienter is lacking or the repose period renders the claim time-barred, such a predicate claim cannot be deemed to create a basis for liability or be actionable. Despite respondent's arguments, no authority cited by respondent, outside of the lower courts in this action, has concluded that determining what constitutes a "violation" excludes considering the timeliness of the alleged claim. Indeed, respondent chose not to address the Fourth Circuit's decision last year in *Hunter* that affirmed the dismissal of the plaintiffs' derivative claim under Section 20A because it "depended upon the *liability* alleged in the first count [Section 10(b)]." Pet. at 20 (quoting 477 F.3d at 169) (emphasis added).

Respondent attempts to minimize this Court's reference to the limitations period as an element of a Section 10(b) claim by pointing to non-securities decisions where this Court discussed limitations periods as affirmative defenses. Opp. at 10 & n.3 (citing *Jones v. Bock*, 127 S. Ct. 910 (2007), and *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750 (2008)). Respondent's argument is a red herring. It is not a matter of who has the burden of proof with respect to the limitations period, especially in a case such as this where it is an undisputed repose period at issue determinable from the face of the complaint.

Rather, it is a matter of whether a violation can be alleged to have occurred when the predicate claim is time-barred. As this Court stated in *Jones v. Bock*, one of the cases relied upon by respondent, "[i]f the allegations, for example, show that relief is barred by the applicable statute of limitations, the complaint is subject to dismissal for *failure to state a claim*...." 127 S. Ct. at 920-21 (emphasis added). Whether viewed as an element or an affirmative defense, in either case, *the claim fails and no violation can be alleged. See also Plaut*, 514 U.S. at 228.

II. The Ninth Circuit Decision Is in Conflict with the Statute's Language and Legislative History.

In arguing the plain language of Section 20A's outside limitations period, the respondent, like the Ninth Circuit, treats the statute as if it were an independent, standalone liability provision. It is not. In fact, the plain language of the first subsection of Section 20A makes clear that the claim is entirely derivative, requiring in the first instance that a predicate violation exist. 15 U.S.C. § 78t-1(a). Given this statutory scheme, it makes no sense to argue that a plaintiff who has slept on his or her rights and, therefore, is barred from bringing the predicate claim can nonetheless assert the derivative claim based on the very same conduct. How can one have an overlying claim when there is no underlying claim? Respondent's argument effectively creates two statutes of limitations for the very same conduct. There is no reason to believe that Congress intended such a nonsensical result. The effect of it would be to render the limitations period for the predicate

violation a nullity. No plaintiff would ever need to comply with the limitations period for the direct claim (including the three-year period of repose that this Court held in *Lampf* cannot be equitably tolled). Instead the plaintiff could always simply wait and take advantage of the alleged longer period available under Section 20A.[2]

Respondent tries to rationalize that result by suggesting that the purpose of Section 20A was to extend the limitations period for insider trading claims. Opp. at 12. But, there is nothing in either the text of the statute or its legislative history that supports this contention. Instead, the purpose was to ensure that those who traded contemporaneously with (but were not in privity with) the alleged inside trader also had a private right of action for recovery of damages. Pet. at 4-5. Section 20A's very first provision dealing with the predicate violation requirement establishes this focus, both in the text of the provision itself and in its title: "Private rights of action based on contemporaneous trading." 15 U.S.C. § 78t-1(a). Further, the legislative history confirms

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[2] Respondent's re-phrasing of the question presented by the petition reveals this very flaw: "Whether a timely claim for insider trading brought within the express statutory five year limitations period of Section 20A ... requires the pleading of a predicate violation that is itself timely under the balance of the Exchange Act's then applicable three year period of repose." Opp. at i. Asserting that the Section 20A claim is a "timely" one extricates the predicate violation requirement from the statute and purports to assume the very question to be decided in this appeal.

that Congress did not intend to alter the substantive law of insider trading claims as they then existed. Pet. at 21 (citing 134 Cong. Rec. H7470 (1988); 134 Cong. Rec. H7468 (1988)). Eliminating the force and effect of the limitations period applicable to Section 10(b) claims for purposes of supporting an identical, but derivative, claim under Section 20A for insider trading would certainly constitute altering the then-governing substantive law of such claims.

Nor is respondent aided by his assertion that "Congress enacted Section 20A with a five year limitations period because it recognized the unique difficulties in identifying insider trading and adopted the *longer* limitations period as one of 'a variety of measures designed to provide greater deterrence, detection and punishment of violations of insider trading.'" Opp. at 8 n.2 (citing H.R. Rep. No. 100-910, at 7 (1988)) (emphasis added). First, the full section of the provision to which respondent cites addresses the Insider Trading and Securities Fraud Enforcement Act of 1988 as a whole, and not the limitations period in Section 20A in particular. Nothing in this report or elsewhere indicates that Congress intended to nullify the limitations period governing the underlying predicate violation.

Second, respondent's contention that a longer limitations period was applied because of the difficulty in ferreting out evidence of insider trading incorrectly suggests that the repose periods applied to insider trading claims prior to Section 20A were all shorter than five years. Opp. at 8-9 n.2, 12. This is not true. As the petition explains, there was no

uniform limitations or repose period for Section 10(b) claims at the time Section 20A was enacted, and some jurisdictions adopted analogous limitations periods five years or longer, including as long as ten years.[3] Pet. at 5-6, 5-6 n.2, 22 n.7.

Unlike the approach advanced by respondent and the Ninth Circuit, which renders the predicate violation requirement meaningless, petitioners' interpretation of the statute does not render any of the provisions irrelevant. Rather, Section 20A's outside limitations period of "no more than 5 years" is consistent with the differing Section 10(b) limitations and repose periods at the time of enactment, serving as a backstop for when any of these claims could support a derivative claim under Section 20A.[4] This

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[3] For these same reasons, respondent's citations to *Short v. Belleville Shoe Manufacturing Co.*, 908 F.2d 1385, 1392 (7th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991), and *Newby v. Lay*, 258 F. Supp. 2d 576, 601 (S.D. Tex. 2003), do not support his argument. Neither case provides legislative support for the suggestion that the five-year backstop provided by Section 20A was meant to lengthen the limitations periods applied to insider trading claims previously brought under Section 10(b).

[4] Contrary to respondent's assertions (Opp. at 15-16 n.7), the idea that the underlying claim (Section 10(b)) also should not be the overlying claim (Section 20A) is very relevant to this appeal because it shows the error in interpreting the statute as respondent does. First, it makes no sense to have two statutes covering the very same conduct and claim, but applying different limitations periods. Second, if respondent's position were valid, there would be no need for a predicate violation requirement in Section 20A at all; rather, Section 20A could

is consistent with the Second Circuit's interpretation of Section 20A in *In re Lawrence*, 293 F.3d 615, 620 (2d Cir. 2002). *See* Pet. at 22. Again, respondent does not address this decision. Simply put, respondent's preferred conclusion cannot be reconciled with the legal landscape at the time of Section 20A's enactment or with its legislative history. *See Great N. Ry. Co. v. United States*, 315 U.S. 262, 273 (1942) (statutes are "the product of a period, and 'courts, in construing a statute, may with propriety recur to the history of the times when it was passed'" (internal citations omitted)).

Finally, petitioners' interpretation is consistent with the present nature of the civil securities laws, where statutes like the Private Securities Litigation Reform Act of 1995 and the Court's decisions thereunder confirm that private rights of action under the Exchange Act are not to be treated as an opportunity to force defendants into settlement because the adjudication of such cases on the merits can take many years and cost millions of dollars to defend. Where the plaintiff has failed to present the facts with particularity that would support a violation when filing the complaint, the case must not proceed. That is precisely the situation here where the repose period applicable to the Section 10(b) predicate claim lapsed before respondent filed this action. There is no reason to put the petitioners through years of litigation and

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stand alone. The portion of the oral argument before the Ninth Circuit to which respondent refers does not suggest otherwise.

millions of dollars in costs when the answer is a purely legal one resolved at this stage of the proceedings and no liability exists.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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